

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ROBERT LEWIS SCHMIDT, dba
KENMORE MUFFLER,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 85-217

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeal of a \$2,000 civil penalty for removing catalytic converters allegedly in violation of respondent's WAC 18-24-040, came on for hearing before the Pollution Control Hearings Board, Wick Dufford, presiding, Lawrence J. Faulk and Gayle Rothrock, at Lacey, Washington, on March 14, 1986.

Appellant appeared by his attorney, James V. Grubb. Respondent appeared by Terese Neu Richmond, Assistant Attorney General. Reporter Lisa Flechtner recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From

1 the testimony heard and exhibits examined, the Board makes these

2 FINDINGS OF FACT

3 I

4 Emission control systems, known as catalytic converters, are
5 installed in modern motor vehicles by all manufacturers, under federal
6 law, for the purpose of suppressing the emission of carbon monoxide.
7 The converters function as afterburners completing the fuel combustion
8 process.

9 II

0 In 1984, the Washington State Department of Ecology initiated a
1 program, with federal funding, to identify automotive repair shops
2 which tamper with or remove catalytic converters from automobiles. An
3 investigative unit was organized to engage in anti-tampering
4 enforcement. This unit operates undercover; members of the unit pose
5 as ordinary citizens bringing their cars to a shop for repair.

6 III

7 Appellant Robert L. Schmidt operates an auto muffler shop called
8 Kenmore Muffler in Kenmore, Washington. On April 16, 1985, acting on a
9 lead received for a local auto parts shop, an Ecology investigator
0 drove to the appellant's shop. She drove a rented 1984 Toyota Corolla
1 equipped with a functioning catalytic converter.

2 IV

3 On April 16, 1985, at Kenmore Muffler, Ecology's investigator
4 operating under the assumed identity of one Julie Jacoby, met
5 appellant Robert Schmidt who described himself as the manager. She

1 stated that the car she was driving emitted an obnoxious odor
2 resembling sulfur or rotten eggs, even though she kept it timed and
3 tuned.

4 Schmidt responded that the cause of the odor was the catalytic
5 converter. He told her that removing converters is illegal and might
6 subject him to fines, but that there was a way of getting around the
7 law. He proposed that she sign a form stating that she was going to
8 replace or reinstall the converter.

9 The investigator stated that she was not going to put a converter
10 back on the car and told him she lacked the money to purchase a new or
11 used converter. Appellant stated that he would only charge \$40 to cut
2 off the converter and replace it with a straight piece of pipe. He
3 said that the car would run better and get better mileage after being
4 retimed with the converter removed.

5 V

6 Appellant made no test of any kind to determine the source of the
7 supposed rotten egg smell. He did not look under the hood or examine
8 any part of the car. No such smell had, in fact, been coming from the
9 car. He directed the inspector to drive the Toyota onto the lift in
10 his shop. He then raised the vehicle in the air, lit a torch and cut
1 the catalytic converter off the exhaust system. Thereafter, he
2 selected a piece of pipe from the rear of his shop and welded it in
3 place of the removed converter. The converter was placed in the back
4 of the Toyota at the investigator's request.

VI

After the work was complete, Schmidt made out a receipt, writing in the following notation:

I removed converter for testing purposes. Will return to either have converter reinstalled or have a new converter installed.

He asked the investigator to sign the receipt, saying that the statement was for his protection. She signed, with the name Julie Jacoby, and paid the total charges indicated of \$43.40.

VII

During the April 16 encounter, no mention was made of an appointment to return and see if the problem was cured; no replacement converter was ordered; there was no discussion of any further work on the Toyota. Instead, as she was leaving, the investigator mentioned her elderly aunt's car was having the same problem. Schmidt said to bring it in and that he would get rid of the problem. The investigator drove the Toyota away with neither a converter in place nor any definite arrangement for putting one on.

VIII

On April 19, 1985, the same investigator returned to Kenmore Muffler, this time in a rented 1985 Chevrolet Cavalier stationwagon, again equipped with a functioning catalytic converter. She was accompanied by another woman whom she identified as the car owner. They were met by Schmidt. The investigator indicated that this vehicle also was making a sulfur or rotten egg odor and asked Schmidt to explain what might be wrong. He said that the odor was caused by

1 the catalytic converter and stated that they could solve the problem
2 in one of three ways: (1) have the car tested and tuned up; (2)
3 replace the catalytic converter; (3) remove the converter and replace
4 it with a straight piece of pipe.

5 On being asked if removing the converter is illegal, Schmidt said
6 yes and that he might be fined if he were caught doing it. He
7 explained, however, that he could protect himself by getting the car
8 owner to sign a statement saying she was going to replace it. The
9 investigator then said that neither she nor the car owner could afford
10 to purchase a replacement converter. He said the receipt form was
11 merely for his protection.

2 IX

3 The inspector told Schmidt, "Do what you have to do." He directed
4 the inspector to drive the stationwagon onto his lift. He raised the
5 car into the air and cut off the catalytic converter with a torch.
6 Then he welded a straight pipe into the place where the converter had
7 been. The removed converter was placed on the seat of the vehicle.

8 No test or examination of any kind was performed to determine
9 either the cause or the existence of the reported sulfurous odor.

0 X

1 For this operation another receipt was filled out by Schmidt. He
2 wrote the following on it:

3 I removed converter for testing purpose. I will
4 return to have a new converter installed or
5 reinstall my old one.

6 The alleged car owner, upon request, signed the receipt and paid the

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1 \$43.24 charged.

2 XI

3 During the April 19 encounter, no new converter was ordered; no
4 appointment was made to return; no discussion was had regarding any
5 future work on the Chevrolet.

6 Moreover, on this occasion, Schmidt made no inquiry or mention
7 whatsoever regarding the Toyota he had worked on three days before.
8 The investigator and her companion drove the stationwagon away with
9 neither a converter in place nor any definite arrangement for putting
10 one on.

1 XII

2 From Schmidt's actions on April 16 and April 19, 1985, it is
3 obvious that he believed he could shift the responsibility for any
4 illegality involved in removing the converters away from himself by
5 getting his customers to sign the notations which he composed.

6 XIII

7 Schmidt introduced economic data showing that his business has
8 been losing money and continues to face severe economic difficulties.
9 He is, however, a person of considerable experience in the muffler
10 business, having worked at this specialty for 15 years.

1 XIV

2 The Department of Ecology regulation at issue provides:

3 WAC 18-24-040 STANDARDS OF MOTOR VEHICLES. No
4 person shall remove or render inoperable any
5 devices or components of any systems on a motor
6 vehicle installed as a requirement of federal law
7 or regulation for the purpose of controlling air

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contaminant emissions, subject to the following conditions:

(1) The components or parts of emission control systems on motor vehicles may be disassembled or reassembled for the purpose of repair and maintenance in proper working order.

(2) Components and parts of emission control systems may be removed and replaced with like components and parts intended by the manufacturer for such replacement.

(3) The provisions of this section (WAC 18-24-040) shall not apply to salvage operations on wrecked motor vehicles when the engine is so damaged that it will not be used again for the purpose of powering a motor vehicle on a highway.

XV

The pertinent penalty provision in this matter provides, at RCW 70.94.31:

(1) In addition to or as an alternate to any other penalty provided by law, any persons who violates any of the provisions of chapter 70.94 RCW or any of the rules and regulations of the department or the board shall incur a penalty in the form of a fine in any amount not to exceed one thousand dollars per day for each violation. Each such violation shall be a separate and distinct offense, and in case of a continuing violation, each day's continuance shall be a separate and distinct violation. For the purposes of this subsection, the maximum daily fine imposed by a local board for violations of standards by a specific emissions unit is one thousand dollars.

(2) Further, the person is subject to a fine of up to five thousand dollars to be levied by the director of the department of ecology if requested by the board of a local authority or if the director determines that the penalty is needed for effective enforcement of this chapter. A local board shall not make such a request until notice of violation and compliance order procedures have been

1 exhausted, if such procedures are applicable. For
2 the purposes of this subsection, the maximum daily
3 fine imposed by the department of ecology for
violations of standards by a specific emissions
unit is five thousand dollars.

4 XVI

5 On August 22, 1985, Ecology assessed penalty No. DE85-622 for
6 \$2,000 against Robert Lewis Schmidt dba Kenmore Muffler for illegally
7 removing catalytic converters from a 1984 Toyota Corolla and a 1985
8 Chevrolet Cavalier in violation of WAC 18-24-040, on April 16 and
9 April 19, 1985, respectively. Schmidt appealed the penalty to this
0 Board on October 30, 1985.

1 XVII

2 Any Conclusion of Law which is deemed a Finding of Fact is hereby
3 adopted as such.

4 From these Findings of Fact the Board comes to these

5 CONCLUSIONS OF LAW

6 I

7 The issues are (1) whether the regulation proscribes the activity
8 in question, (2) whether appellant can effectively shift
9 responsibility for removing the converters to his customers, and (3)
0 if the first two issues are decided against appellant, whether the
1 penalty is excessive.

2 II

3 The validity of the Ecology regulation at issue, WAC 18-24-040,
4 was upheld in Frame Factory v. Department of Ecology, 21 Wn.App. 50,
5 583 P.2d 660 (1978). The court found the rule to be reasonably

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1 consistent with the purpose of the Clean Air Act, 70.94 RCW. Id.
2 p.54. Moreover, the court emphasized that the Act's purpose is to
3 provide air pollution prevention and control. Id. p.53.

4 We are mindful of that purpose as we interpret the meaning of the
5 rule's terms. We hold, first, that these catalytic converters are the
6 type of device addressed in the rule. Secondly, that the rule's
7 admonition that "No person shall remove . . ." applies not only to car
8 owners but to all persons, including operators of auto repair shops.
9 Thirdly, when a person removes a converter, that person violates WAC
10 18-24-040 where, as here, the vehicle goes back into operation before
11 like components are installed. Nothing in the enumerated subsections
12 of the rule authorizes operation of the vehicle. Moreover, this is
13 the only interpretation of the rule which is consistent with the Act's
14 purpose of air pollution control.

5 III

6 We decide, further, that the Clean Air Act and WAC 18-24-040
7 implementing it, impose a statutory duty upon an automotive shop
8 operator which cannot be transferred or delegated away. See Sea Farms
9 v. Foster and Marshall, 42 Wn.App. 308 (1985). We conclude that
10 appellant violated WAC 18-24-040 on the two separate occasions
11 involving the two separate cars in this matter and that the receipts
12 he invented were ineffective to shift liability from him.

13 IV

14 Mr. Schmidt's belief, however sincere, that the receipt statements
15 he concocted would exonerate him, does not affect his liability. The

1 Clean Air Act is a strict liability statute. See, e.g., RCW
2 70.94.040. Similarly WAC 18-24-040 makes no reference to mental
3 states in describing acts prohibited by its terms.

4 We conclude that a civil penalty was properly imposed under RCW
5 70.94.431, and, under all the circumstances, decide also that
6 Schmidt's misunderstanding of precisely how the regulations operate
7 should not serve to mitigate the amount of the penalty. He is a man
8 of considerable experience in the business and was well aware that his
9 actions put him in some legal jeopardy. The least inquiry would have
10 cured any confusion he might have had about the regulations .

11 We note that the penalties at issue are not the maximum penalty
12 available under RCW 70.94.431. The section allows penalties, in
13 proper circumstances, of up to \$5,000 per incident, or a potential
14 maximum of \$10,000 in the instant case. We note, further, that the
15 anti-tampering regulations apply across the board to all persons
16 regardless of their economic condition. We do not believe that
17 appellant's financial difficulties can serve as an excuse for failing
18 to live by the rules all other businesses are expected to observe.
19 See American Plating Company v. State of Washington, Department of
20 Ecology, PCHB No. 84-340 (January 23, 1986).

21 Appellant operates a commercial enterprise and charged a fee for
22 removing the converters. He made no test of the car or the converters
23 before removing them and took no affirmative steps after each removal
24 to arrange for the reinstallation of the converters. Indeed, he
25 exhibited no concern for the possibility that emissions from the cars

1 could be uncontrolled, indefinitely, due to his actions.

2 On the record before us, we find the amount of penalty to be
3 justified and reasonable here, particularly in light of the broad
4 deterrent aims of the penalty section.

5 Nonetheless, we believe some consideration should be given to the
6 economic plight of appellant. We urge that Ecology adopt a liberal
7 program of periodic payments in endeavoring to collect this penalty.

8 V

9 Any Finding of Fact which is deemed a Conclusion of Law is hereby
0 adopted as such.

11 From these Conclusions of Law the Board enters this
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ORDER

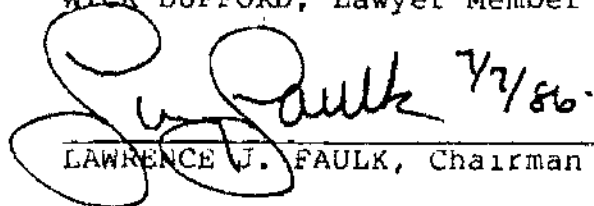
The Notice of Penalty Incurred and Due, DE85-622, issued by the Department of Ecology to Robert Lewis Schmidt, dba Kenmore Muffler, is affirmed.

DATED this 7th day of July, 1986.

POLLUTION CONTROL HEARINGS BOARD



WICK DUFFORD, Lawyer Member

 7/7/86.

LAWRENCE J. FAULK, Chairman



GAYLE ROTHROCK, Vice Chairman